IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No [redacted]

FEDERAL TRA[redacted]SSION, 24

Petitioner,

v.

TEXACO INC. and THE B. F. GOODRICH COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

MILTON HANDLER
425 Park Avenue
New York, New York 10022

AMZY B. STEED
135 East 42nd Street
New York, New York 10017

Attorneys for Respondent Texaco Inc.

STANLEY D. ROBINSON
MILTON J. SCHUBIN
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
Of Counsel

EDGAR E. BARTON
14 Wall Street
New York, New York 10005
Attorney for Respondent
The B. F. Goodrich Company

MACDONALD FLINN
WHITE & CASE
Of Counsel

INDEX

Table of Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1049

FEDERAL TRADE COMMISSION,

Petitioner,

v.

TEXACO INC. AND THE B. F. GOODRICH COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. The Object of the Appeal: Enforcement of the Commission's Order Outlawing the Sales Commission Plan

Petitioner prays for the remand of this case to the Court of Appeals "with directions to enforce the Commission's order, except for paragraphs 5 and 6 directed against Texaco."[1] It notes that:

> "The Commission has not challenged the action of the court of appeals in setting aside paragraphs 5

---

[1] Petitioner's Brief (hereafter "P. Br.") 28.

and 6 of the order against Texaco, which prohibited the latter from overtly coercing its dealers" (P. Br. 9 n. 4).[2]

Thus, this Court now has before it the precise opposite of what was presented to it in *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965). There, after the Court of Appeals found that Atlantic had coerced its dealers, this Court observed:

> "* * * Atlantic has conceded the point [coercion] by not perfecting an appeal thereon" (381 U.S. at 367).

Here, *per contra*, after the Court of Appeals found that Texaco had *not* coerced its dealers, the Commission acquiesced in this ruling by not perfecting "an appeal thereon," thus eliminating coercion from this case.

In *Atlantic*, this Court upheld an order prohibiting Atlantic from having a sales commission plan with respect to tires, batteries and automotive accessories ("TBA") on the ground that

> "The long existence of the plan itself, *coupled with the coercive acts practiced by Atlantic pursuant to it, warranted a decision to require more* [than enjoining Atlantic's "use of overt coercive tactics"]. The Commission could have decided that to uproot

[2] The Court of Appeals held, in this regard, that

"... the coercion aspect of the Commission order has no basis in law, or the record. Since we have twice determined there is no basis that Texaco overtly coerced any substantial number of dealers or that a pattern of coercion existed, the provisions of the order prohibiting such coercion were and are baseless." (Appendix, Volume VI 119 n. 16).

Hereafter, the appendix will be cited as "A.", followed by the Roman number of the volume and arabic number page, viz. "A.VI. 119 n. 16."

> the practice [*i.e.,* Atlantic's forcing its dealers to purchase only sponsored TBA] required its complete prohibition; otherwise *dealers* would not enjoy complete *freedom* from unfair practices which the Act condemns" (381 U.S. at 372-73; emphasis added).

Petitioner would impose the same drastic order here although Texaco does not coerce its dealers. On the contrary, as the Court of Appeals expressly found, Texaco dealers have always been free to purchase any brand of TBA they desired (A.VI. 117)—a finding which petitioner does not, and cannot, attack as clearly erroneous.

B. The Business Practices Involved

During the 1930's there was a gradual shift in the nature of retail petroleum outlets from "filling stations," which merely handled gasoline, lubricants and greases, to "one-stop service stations," where the motorist could go for all of his product and service needs (A.III. 2343-47). The latter required larger and costlier facilities, including storage and display space for TBA, and entailed very substantial investments by the oil companies (*id.* at 2349). A company not providing these facilities, however, would be at a serious competitive disadvantage. Its dealers would lose petroleum business to the "one-stop service stations" preferred by motorists and it would lose its better dealers to oil companies which afforded them this opportunity of earning greater revenue (*id.* at 2347-49).

Conversely, enabling the dealer to handle a full line of TBA, seeing that he receives adequate training in the marketing and use of this range of products so that he can properly service his customers, and assisting him with TBA

suppliers to make certain that he receives reasonable and prompt attention from them, will increase his revenue, enable the company to obtain and retain better dealers and directly further the sale of gasoline. As the Examiner found, it is in the interest of Texaco that its dealers sell TBA since this builds a stronger dealer organization and increases the sale of gasoline (A.I. 207).

To accommodate these considerations (A.III. 2349), Texaco entered into sales commission agreements with Goodrich and Firestone in 1940 under which each rubber company agreed to pay Texaco a commission for its services in promoting their products to Texaco outlets. Neither contract grants any exclusive right to Texaco's promotional services or any assurance of purchases in any amount or by any number and each is terminable by either party on 120 days written notice (A.IV. JAX 8-9, 16-17, 150, 151, 166).

Goodrich and Firestone products were selected for sponsorship by Texaco because their national advertising, wide distribution and high quality make them both very saleable and desirable (A.I. 389-90; A.V. JAX 424).

While Texaco had an interest in encouraging its dealers to handle TBA generally, and Goodrich and Firestone products particularly, Texaco from the outset was guided by a more fundamental overriding interest. In its view, more important than any commissions it might earn in the short run, were the long-term benefits to be obtained by fostering and preserving the loyalty and respect of its dealers. If dealers were alienated, they might seek other business opportunities; it might become difficult to interest other qualified persons to replace them; Texaco service stations might close for lack of operators and Texaco's

dealer organization might become demoralized. To Texaco's way of thinking, these risks outweigh any commission that might be earned by attempting to exercise power over its dealers to cause them to buy sponsored TBA (A.III. 2362-64; A.I. 381-82). Indeed, as Texaco sees it, any interference with the freedom of its dealers would be "*economic suicide* from our standpoint" (A.III. 2363; emphasis added).

Texaco, therefore, carefully structured its TBA program to avoid the possibility of antagonizing its dealers. In contrast to the Atlantic and Shell programs, the Texaco salesman was never put in a situation where he could tell a dealer to buy from a specific source. Where Atlantic and Shell gave each TBA supplier an exclusive territory and assigned each dealer to a designated supply point (381 U.S. at 364-65, 370; 360 F.2d at 484) maintained by one of the suppliers (precluding even intrabrand competition), Texaco did no such thing. Goodrich and Firestone have always had to compete for the business of the Texaco dealers and the distributors of each rubber company compete among themselves for it (there being no designated supply points)—all against the numerous other TBA brands which are offered to and purchased by Texaco dealers in huge quantities. Moreover, since Texaco's salesmen may not favor any one source of supply in any area (A.IV. JAX 79), they are required to maintain a neutral, hands-off attitude in negotiations between a TBA supplier and a dealer. Texaco's salesmen are instructed:

> "If, in exercising his own free choice of the brand of TBA merchandise he desires to handle, the dealer expresses a preference either for the Goodrich or Firestone line, following a clear cut and straightforward presentation of the Texaco TBA program

as outlined, the Texaco representative should assist the dealer further by arranging to introduce him to a sales representative of the supplier chosen by the dealer. It should be recognized at all times that the negotiations between the dealer and the TBA representative, and any purchase arrangement resulting therefrom, are matters for their mutual consideration, and *the Texaco representative should not interfere with or attempt to influence such negotiations or purchase arrangements in any way*" (A.IV. JAX 90; emphasis added).

Furthermore, Atlantic's dealer leases required the lessee to have Atlantic's prior written consent before placing any signs on or removing them from the leased premises. Atlantic used this power to control "all advertising on the premises of its dealers" and "permitted no signs or displays other than those of sponsored products" (381 U.S. at 368, 365 n. 7). Texaco's leases contain no such provision and its dealers freely advertise and display non-sponsored TBA (A.V. JAX 547-88).

In addition to these and other basic structural distinctions, including the fact that not a single policing device was ever employed by Texaco whereas Atlantic maintained an intricate program of dealer policing and surveillance to stamp out resistance to Goodyear TBA,[8] Texaco continuously emphasized to its salesmen that there must be no interference with the freedom of choice and independ-

[8] For example, it had dealer TBA quotas for sponsored products (381 U.S. at 365); it enlisted the help of Goodyear in identifying recalcitrant dealers (*id.* at 366, 374); it employed phantom inspectors (58 FTC at 339; 331 F.2d at 396) and it received reports on its dealers to detect non-sponsored TBA purchases (381 U.S. at 374). This Court noted that the success of Atlantic's TBA efforts stemmed from "the effective policing of the plan" (*id.* at 366).

ence of the Texaco dealer.[4] Texaco's practice, which it has repeatedly communicated, is

> "that the Company has neither the right nor the desire to dictate to the dealer the brand or type of merchandise he should handle, or the source from which he should purchase such merchandise, or to require him to handle any TBA merchandise. . . . The importance of respecting the independence of the Texaco dealer and his right to exercise his free and independent judgment with respect to the brand of TBA merchandise he will handle, and the quantities he will purchase, cannot be overemphasized" (A.V. JAX 423, 426).

Out of an abundance of care, Texaco's sales personnel have long been specifically enjoined by the Company from attempting to exercise any economic power over dealers:

> "It is not in accord with the dealer's contract with The Texas Company to infer or indicate to a Texaco dealer directly or indirectly that any purchase by him of any type of merchandise from any supplier whatsoever will result in a reduction of the supply of petroleum products available to him or in a cancellation of any sales contract or lease agreement that may be in effect or in any other event which will make him feel that more persuasion is being exercised by us than would normally and properly be used by us toward a customer" (A.V. JAX 430).

* * *

[4] A.I. 391-92, 733-34; A.II. 1097, 1114-15, 1120-21, 1132-33, 1142-43, 1144-45, 1543-44, 1561; A.III. 1987, 2007-08, 2130-31, 2156, 2178-79, 2192, 2210-11, 2224-25; A.IV. JAX 70, 79-81, 88, 89-92; A.V. JAX 423-26, 430-31, 432-34, 435-37, 439-41, 442-46, 447-51, 452-54, 458-62, 463-66, 467-69, 473-75, 476-78, 479-83, 484-85.

> *"Any one who violates these policies may be subject to immediate dismissal from the Company's service"* (A.V. JAX 431; emphasis added).

Indeed, far from looking disapprovingly at a dealer who did not accept its recommendation to purchase sponsored TBA, Texaco emphatically instructed its sales personnel to render "equal assistance" to the purchaser of *non*-sponsored products:

> "The aim of this program is to counsel with and assist the dealer in the selection of T.B.A. merchandise that will be most suitable to his specific needs and in his establishment of an effective control over the stock through the use of the Suggested Basic Stock Assortments and the Inventory Guide Forms like those furnished by both Firestone and B. F. Goodrich. *It is not to be applied in any manner whatsoever that would impair any dealer's freedom to purchase such brands and quantities of T.B.A. merchandise as he desires.* Our dealers, consignees and distributors are independent businessmen, and instructions that no undue influence is to be used to interfere with their free and independent judgment remain unchanged.
>
> "The Texas Company's selling personnel are expected to become familiar with Firestone and Goodrich Inventory Guide Systems and T.B.A. merchandise and the merchandising of T.B.A. products generally. But, *it should be clearly understood* that we will render *equal assistance* to *all dealers* in setting up and maintaining his own basic TBA stock assortment and Inventory Guide system along these lines *regardless of the brand of merchandise handled."* (A.IV. JAX 81; emphasis added).

Letters sent Texaco dealers concerning their volume discounts on lubricating oil have advised the recipient that "You are free, as you know, to select any brand of TBA merchandise . . ." (A.V. JAX 492, 513). Texaco's policy has been made known to inquiring trade associations of service station dealers and has been publicized in trade publications (A.I. 382-83; A.II. 1097; A.III. 2365-66; A.V. JAX 642-44).

No contract or lease between Texaco and any of its dealers has at any time required the dealer to handle Goodrich or Firestone TBA or, in fact, any TBA at all. No Texaco dealer has ever had his supply of petroleum products reduced or his lease or sales agreement cancelled as a result of his rejection of sponsored TBA. In contrast to Atlantic's total conversion of its dealers to sponsored TBA within a matter of months, after more than 15 years of Texaco's sales efforts two-thirds of all Texaco retail outlets do not buy any Firestone or Goodrich tires and tubes and only about 20% regularly buy any of these companies' batteries or accessories (A.IV. JAX 177-180; see *infra*, pp. 45-6). Those Texaco dealers who handle any sponsored TBA do not buy it exclusively (A.I. 214) and whatever they buy they obtain from any supply point that suits their convenience (A.I. 219).

In sum, as the Court of Appeals pointed out on two separate occasions, Texaco dealers "*are quite free to accept or reject*" Texaco's recommendation with regard to the brands of TBA that they purchase and "*are free to purchase any brand of TBA which they desire to sell*" (A.VI. 13, 117; emphasis added).

C. Nature and History of Proceedings

1. The Complaint

On January 11, 1956, the Federal Trade Commission filed three virtually verbatim complaints: one commencing this case against Texaco and Goodrich; another against the Goodyear Tire and Rubber Co. and The Atlantic Refining Co. (Dkt. No. 6486); and the third against The Firestone Tire & Rubber Co. and Shell Oil Co. (Dkt. No. 6487). Each complaint challenged as an unfair method of competition an agreement whereby the rubber company paid the oil company a commission for the latter's services in promoting the sale of the rubber company's TBA to dealers and distributors selling the oil company's gasoline.

2. The First Commission Opinion Found No Basis in the Record for any Order against Texaco

Five years later, on March 9, 1961, the Commission rendered its separate decisions in each of the three TBA cases. In both the *Atlantic-Goodyear* and *Shell-Firestone* proceedings, it found dealer coercion, unlawful tie-ins and adverse competitive effects resulting from the TBA sales commission agreements; thus it prohibited the agreements. In sharp contrast, in the *Texaco-Goodrich* case the Commission did not find coercion, tie-ins or anticompetitive effects. In the Commission's view, the legality of Texaco's sales commission contract with Goodrich turned upon its "competitive effects" (A.I. 179). It concluded:

> "However, the record in this case does not contain sufficient market data to enable the Commission *to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents.* The case will be remanded to the hearing

examiner *for the taking of evidence indicating the competitive effects* of the sales commission contracts at the manufacturing, wholesale and retail levels of TBA distribution'' (A.I. 186; emphasis added).

3. Texaco's Efforts to Bar the Remand Hearings

Texaco and Goodrich promptly brought an action against the Commission in the District Court for the District of Columbia, *Texaco Inc.* v. *FTC,* Civil No. 2219-61. They contended that after at least nine years of investigation and trial, the Commission, having found the evidence insufficient to support its charges, was without authority or discretion to remand for the receipt of ''further evidence'' not shown to exist. An injunction was sought against further proceedings as being in excess of the Commission's authority, in derogation of the Commission's statutory duty to proceed with reasonable dispatch and in violation of constitutional requirements of due process. In opposing this suit, counsel for the Commission represented that the Commission ''needed additional evidence in order to decide the issues presented,''[5] and that the remand was not to be a retrial of what had gone before.[6] Relying on these representations, the Court denied a temporary injunction but ruled that Texaco and Goodrich would be entitled to relief unless all further evidence was heard and the Examiner filed his decision by October 2, 1962. Subsequent attempts to obtain immediate temporary injunctive relief from the

---

[5] Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 26, served August 28, 1961.

[6] Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, pp. 17, 21, filed April 30, 1962.

Court of Appeals and from this Court were unsuccessful. *Texaco Inc.* v. *FTC*, Appeal No. 17,111 (D.C. Cir. June 22, 1962); *Texaco Inc.* v. *FTC* (U.S. Sup. Ct. July 10, 1962); *Texaco Inc.* v. *FTC* (U.S. Sup. Ct. July 10, 1962; Black, J.). In each instance the tribunals were advised by Commission counsel that the remand was essential to develop needed additional evidence.

4. The Sham Remand Hearings

The remand hearings lasted 2½ days and closed on July 19, 1962 without any additional evidence having been adduced by Commission counsel. Instead, counsel induced the Examiner to take official notice of certain matters in the Commission's opinion in the *Shell-Firestone* case. The Examiner brushed aside Texaco's plea that the doctrine of official notice did not permit shuffling evidence of findings from case to case, thereby cutting off the right of cross-examination and shifting the burden of proof. Subsequently, the Commission upheld Texaco on this point by eliminating from consideration anything adduced at the remand (A.I. 302-03; A.VI. 80 n. 3, 94).

5. The Revised Initial Decision in Violation of the Commission's Mandate

The Examiner had been authorized only to receive "further evidence concerning the competitive effects of the respondents' practices" and to indicate what changes, if any, he wished to make in his first Initial Decision in light of such evidence (A.I. 174). Nevertheless, on September 24, 1962, without any additional evidence from Commission counsel, he held that the use of the sales commission method

of distributing TBA violated Section 5 of the Federal Trade Commission Act, and he issued an order which duplicated that entered by the Commission in the other two TBA cases.

6. The Second Commission Opinion

On April 15, 1963, eleven days after hearing oral argument of the "second round" appeal, the Commission handed down a 3-1 *per curiam* decision holding precisely the opposite of what it had held on March 9, 1961. Looking only to the pre-remand record, and without reviewing any evidence in its three paragraph opinion, the Commission ruled that the old record "amply supports the conclusions and the order of the hearing examiner" (A.I. 302). No basis for its reversal of position was set forth. As legal authority, the Commission merely cited its two other TBA decisions which it had handed down on the very day when it had earlier found the record in this case insufficient.[7]

Before this second appeal to the Commission, the participation of Chairman Dixon, one of the members of the Commission majority, had been unsuccessfully challenged by Texaco. Prior to the remand hearings before the Examiner, Chairman Dixon, in a speech made on July 25, 1961, had publicly denounced the practices attacked by the complaint as illegal and had specifically named Texaco and Goodrich in this connection.

[7] Commissioner MacIntyre did not participate. Commissioner Anderson, who was the only member of the Commission who had participated in its earlier decision, did not concur "for the reason that the command of the remand order of March 9, 1961 had not been met and complied with" (A.I. 303).

7. The First Decision of the Court of Appeals

On the appeal from the Commission's 1963 Decision, the Court of Appeals was unanimous that "Chairman Dixon's participation in the hearing amounted in the circumstances to a denial of due process which invalidated the order under review," and that the motion for his disqualification should have been granted (A.VI. 8).

With respect to the merits, a majority further held that there had been a failure of proof. First, it ruled that coercion had not been proved (A.VI. 13), specifically finding that the record "demonstrates the contrary" of "coercive tactics" (A.VI. 12). Not only is it Texaco's policy "to respect the independence of its dealers," but such policy was followed in actual practice (A.VI. 11).

Second, noting that under the Commission's view of the law an essential element of a Section 5 violation was Texaco's possession and exercise of controlling economic power over its dealers, the Court ruled that there was no substantial evidentiary basis for any such finding (*ibid.*).

Third, it inferentially ruled that no anticompetitive effects had been shown when it found that Texaco dealers "are quite free to accept or reject" Texaco's "recommendation" concerning TBA (A.VI. 13).

Finally, the Court held that the Commission's

> "efforts in this case—fruitless after a dozen years—have exceeded permissible limits and have had unreasonably harassing and oppressive effects upon the companies under attack" (*ibid.*).

The Court concluded:

> "Because the Commission's drastic orders are not supported by the record as a whole and because of

the undue protraction of the administrative process, we are of the opinion that this long drawn out proceeding should now be terminated" (*ibid.*).

8. *Atlantic* Case Taken to This Court

In reaching this conclusion, the Court of Appeals was well aware of the Seventh Circuit's ruling on different facts in *Atlantic-Goodyear*,[8] which had been decided a few months earlier.

The record before the Seventh Circuit had literally seethed with evidence of Atlantic's coercive practices vis-a-vis its dealers. In this context of overwhelming proof that Atlantic's dealers were being forced by Atlantic to act contrary to their wishes, the Seventh Circuit characterized them as "economic serfs" and affirmed the Commission's order.

In seeking review before this Court, Atlantic conceded that it had coerced its dealers and did not challenge the anti-coercion order. What Atlantic contested was the prohibition against the sales commission plan itself, arguing that such additional relief was unnecessary.

9. This Court's *Atlantic* Decision

Finding that Atlantic had successfully "marshaled its full economic power in a continuing campaign to *force* its dealers and wholesalers to buy Goodyear products" with a concomitant detrimental impact on competition (381 U.S. at 371; emphasis added), this Court sustained the order prohibiting Atlantic from being a party to TBA sales commission agreements. The Court held that such a prohibi-

[8] *Goodyear Tire & Rubber Co.* v. *FTC*, 331 F.2d 394 (7th Cir. 1964).

tion was warranted because of the "long existence of the plan itself, *coupled with the coercive acts practiced by Atlantic pursuant to it*" (381 U.S. at 372; emphasis added).

10. This Court's Prior Disposition of This Case

While Atlantic's petition for certiorari was pending before this Court, the government petitioned for certiorari in this case but did not seek review of the decision disqualifying Chairman Dixon. Following its decision in *Atlantic,* the Court granted the writ, and without passing upon the merits, directed that the judgment of the Court of Appeals be vacated and that the case be remanded to the Commission for further proceedings "in light of *Atlantic Refining Co.* v. *Federal Trade Comm'n,* 381 U.S. 357 (1965)." 381 U.S. 739, 740 (1965).

11. Proceedings Before the Commission After Remand

On remand from this Court, the Commission (Commissioners Dixon and MacIntyre not participating) rendered an opinion dated January 14, 1966 and issued an order identical to the one it had issued in *Atlantic.*

Although the purpose of the remand was to determine "whether the facts of record in the present case" bring it within the *Atlantic* rule, the Commission's opinion eschewed factual analysis. Instead, it proceeded on the newly adopted legal premise that it is inherently unlawful for a "major" oil company to enter into a TBA sales commission arrangement with a "major" rubber company. Under this rule of *per se* illegality, the factual distinctions between *Atlantic* and the present case were deemed beside the point. To the Commission, it made no difference that Atlantic's dealers were forced against their will to purchase

sponsored TBA and Texaco's dealers were not. Texaco, it held, should be accorded the same treatment as Atlantic even if "Texaco has demonstrated no propensity to use coercive tactics in performing its" TBA sales commission plans (A. VI. 88).

The precise order imposed upon Atlantic as being remedially necessary to remove the effects of that company's longstanding coercive practices, was also imposed upon Texaco (A. VI. 95; A.I. 230 et seq.). Apart from paragraphs 5 and 6, which have now been eliminated from the case, the order prohibits Texaco from receiving "anything of value" from *any* TBA supplier in connection with the sale of TBA to Texaco dealers by anyone other than Texaco itself (Par. 1); from acting as a sales agent in connection with TBA (Par. 2) and from recommending to its dealers that they consider the purchase of any particular brand of TBA from anyone other than Texaco — even though Texaco receives nothing of value for such recommendation and regardless of the superiority of the product and the benefit Texaco's dealers might obtain from this information (Pars. 3 and 4).[9]

12. The Fifth Circuit's Decision in *Shell*

By the time this case reached the Court of Appeals again on petitions to review filed by Texaco and Goodrich, the Fifth Circuit had decided *Shell-Firestone.*[10] In that

[9] The Commission's full explanation for the "relief" against Texaco is set forth in two sentences of its decision:

> "We think that orders against both Texaco and Goodrich, identical with the orders against Atlantic and Goodyear which were affirmed by the Supreme Court, are appropriate here. Texaco should clearly *be enjoined from entering into or performing any sales commission plan*" (A.VI. 93; emphasis added).

[10] *Shell Oil Co.* v. *FTC,* 360 F.2d 470 (5th Cir. 1966).

case, Judge Wisdom rejected the Commission's contention that *Atlantic* had held that all sales commission arrangements between major oil and rubber companies were unlawful *per se* (360 F.2d at 479). According to Judge Wisdom:

> "The rationale for the *Atlantic* decision may be broken down into three essential components, each of which depends on the facts of the case before the court:
>
> (1) The oil company's dominant economic power over its dealers;
>
> (2) the exercise of that power over its dealers;
>
> (3) the anti-competitive effects of using that power" (*id.* at 477).

"[O]n the facts of the case before the Court," the Fifth Circuit held that the Shell-Firestone sales commission agreement had violated Section 5: "* * * the controlling facts in this case are so similar to those in *Atlantic* that the same result should be reached in both cases" (*id.* at 475).

13. The Decision Below: The Second Decision of the Court of Appeals

When this case returned for a second time to the Court of Appeals, that Court addressed itself to the question

> "whether the Commission has complied with the remand order and correctly applied the applicable principles enunciated in the *Atlantic* holding" (A.VI. 110).

Its unanimous conclusion, after a second full review of the record and with the benefit of the Fifth Circuit's *Shell* decision before it, was that the Commission had not.

Declaring itself in agreement with Judge Wisdom's view of *Atlantic* (*ibid.*), the court below scrutinized the record in this case in terms of the three essential components of the *Atlantic* rationale.

a. Existence of Dominant Economic Power

As to the first component—the "existence of dominant economic power"—the Court of Appeals revised its prior finding in light of *Atlantic* and, quoting from Judge Wisdom in *Shell*, held that such power was " 'inherent in the structure and economics of the petroleum distribution system' " (*id.* at 112).

b. Exercise of Dominant Economic Power

But on the critical question of whether Texaco had *exercised* dominant economic power—the second essential element under *Atlantic*—the Court of Appeals adhered to its earlier determination that Texaco had not exploited its power to cause its dealers to purchase sponsored TBA.

At the outset, the Court noted that Texaco, unlike Atlantic, had not engaged in coercion. For this reason the Court of Appeals made clear that, wholly apart from the legality of Texaco's sales commission plan, there was no basis in law or fact for the anti-coercion provisions of the Commission's order (*id.* at 119 n. 16)—a ruling on which petitioner does not seek review by this Court. (P. Br. 9 n. 4, 28).

With respect to the legality of the plan itself, the court below advanced *two distinct theories* to support its conclusion that there had been no exercise of dominant economic power.

First, it noted that in *Atlantic* "coercion was found to have permeated the entire Atlantic program, contaminating

even its neutral conduct" (A.VI. 112). The Court of Appeals accordingly viewed "a finding of coercion [as] the threshold requirement of a determination of exercise of dominant economic power" (*ibid.*).

But the court below did not rest its decision on the absence of coercion. As an independent ground for its decision it found that Texaco had not exercised dominant economic power over its dealers even in a non-coercive way:

> "Of course we realize, as did Judge Wisdom in *Shell*, that the 'Company's use of its economic power through the sales commission plan to cause its dealers to buy sponsored TBA *even in the absence of overt coercion*' can constitute an unfair method of competition and a violation of section 5, *Shell* at 482-483" (*id.* at 113; emphasis in original).

The Court then proceeded to meet head-on petitioner's argument that each of the "non-coercive practices" referred to in *Atlantic* are present in equal degree in this case (*ibid.*).

First, the Court emphasized the finding that "Texaco dealers, unlike those of Atlantic and Shell, *were free to accept or reject sponsored products*" (*ibid.*). Amplifying this critical distinction, the Court contrasted Atlantic's sales practices with Texaco's, noting that whereas Atlantic had put pressure on its dealers to "vigorously" represent and cooperate with Goodyear, Texaco had followed a policy of permitting "each dealer to choose whatever brand TBA he desires" (*id.* at 114).

The Court cited other examples of fundamental differences in the two oil companies' sales commission programs: Atlantic's regular policy of "double teaming" and advance solicitation—which with Texaco were "isolated and sporadic" occurrences; Atlantic's TBA dealer quota and

policing system—having no Texaco counterpart; Atlantic's restrictive credit card policy—as distinguished from Texaco's practice of permitting its dealers to charge *non*-sponsored TBA; and Atlantic's assignment of its dealers to a single Goodyear TBA supply point—while Texaco dealers were assigned to nobody, evidencing their freedom to deal with any supplier of their choice (*id.* at 114-15).

Summing up on this issue, the Court declared:

> "These few examples demonstrate a different set of facts between the *Atlantic* record and this case" (*id.* at 115).

The court accordingly concluded that Texaco had *not* "exploited its service station market illegally for the benefit of itself and Goodrich" (*ibid.*).

c. Anticompetitive Effects

With respect to the third requirement—a showing of anticompetitive effects—the Court of Appeals approached the problem from the point of view of both interbrand and intrabrand competition. Once again the records in the two cases were entirely different.

In *Atlantic,* interbrand competition had been snuffed out by reason of "a classic division of territories between Goodyear and Firestone," from which it followed that "Atlantic dealers could only buy at the prices designated by [the] supplier to whom the territory had been allocated" (*id.* at 117). The *Texaco-Goodrich* record, *per contra,* "is devoid of evidence disclosing any form of territorial division" or "price dictation" (*ibid.*). As for the Commission's reliance on certain testimony that non-sponsored TBA suppliers had difficulty selling to Texaco dealers because the latter felt that they were required to buy the

sponsored product, the Court for the second time rejected such evidence as atypical "isolated instances which were generally contradicted by overwhelming rebuttal evidence" (*id.* at 118).

As for intrabrand competition, whereas Atlantic's supply point system had the inevitable effect of precluding such competition, Texaco had no such system; hence there was no parallel anticompetitive effect.

In the face of "the long standing Texaco policy that Texaco dealers are free to purchase any brand of TBA which they desire to sell" (*id.* at 117), the fact that Texaco dealers purchased substantial quantities of sponsored TBA did not constitute proof of the requisite adverse effect on competition.

In sum, the Court concluded that "while the record shows Texaco indeed has dominant economic power, it is fatally deficient on the crucial issues of exercise of that power and subsequent anticompetive effects" (*id.* at 119). For this reason the Court rejected the Commission's position that it would be unfair to prevent Atlantic and Shell, but not Texaco, from using the sales commission plan:

> "We agree that it would be inequitable, and indeed a dereliction of the Commission's obligations, *provided* that all three were guilty of substantially equal violations of section 5. But simply because Texaco is in the same line of business does not mean it must suffer the pain of the misdeeds of other oil companies; *this would indeed be guilt by association.* We conclude that the record simply does not support a finding that Texaco violated the Act" (*ibid.*; emphasis added).

Confronted with the failure of proof in this case, the Court of Appeals recognized that

"One course available to us would be to remand this case once again to the Commission to permit it to develop additional evidence for the record but the Commission and Examiner have had abundant opportunity—*and direct mandate*—to do this in the past and have not done so. We think the time has now come to terminate these protracted proceedings and dismiss the complaint, * * * the Commission has now had more than an adequate opportunity to develop a record in support of its section 5 contentions *over a period of fourteen years*" (*id.* at 119-20; emphasis added).

Accordingly, it directed that the complaint be dismissed.

Summary of Argument

The Court of Appeals correctly concluded that the sales commission arrangement between Texaco and Goodrich is not illegal in and of itself and was not illegally performed. Nothing in the agreements between Texaco and any supplier of TBA requires it to exercise any economic power over its dealers and the evidence in this record, as the Court of Appeals twice found, establishes that Texaco has not done so. On the contrary, Texaco's dealers are completely free to disregard Texaco's recommendations and to purchase whatever brands of TBA they desire.

During oral argument of the *Atlantic* case, the Solicitor General advised this Court that the government was not suggesting that there may not be sales commission arrangements which would pass muster under Section 5; the method of performing the contract was said to be the critical factor determining its legality (*infra*, pp. 31-4). The record in this case demonstrates that it is indeed possible to operate under a sales commission plan so that *no* dealer will be

constrained to accept the oil company's recommendation and *no* anticompetitive effect will be produced. Texaco, unlike Atlantic, has never coerced its dealers or done anything else to require them to purchase sponsored TBA. The Commission in this case expressly discarded coercion as a basis for its decision and petitioner is not seeking an anti-coercion order against Texaco. The fact is that, despite more than 15 years of promotional efforts by Texaco on behalf of sponsored TBA, the vast majority of Texaco dealers purchase *no* sponsored TBA whatever and, as the Examiner found, *every* Texaco dealer purchases non-sponsored TBA.

The Commission which reviewed the evidence in the three TBA companion cases in 1961 found the sales commission arrangements of Atlantic and Shell to be unfair methods of competition, but simultaneously held that the evidence in this record permitted no such finding against Texaco. The present Commission's action here was taken without the reception of an iota of additional evidence against respondents and in contravention of the Commission's own mandate and its representations to the courts regarding the need for more evidence to make out a case under Section 5.

The legal theory on which petitioner is now attempting to condemn Texaco's sales commission arrangements is not sanctioned by anything decided or said by this Court in *Atlantic*. Although the Commission was directed to apply the principles of *Atlantic* here, it has, instead, attempted to coin a brand new theory of liability.

Stripped to its essentials, the theory is this: Since Texaco's economic power is superior to that of any of its dealers, when Texaco promotes the sale of sponsored TBA

the dealer, knowing that Texaco has an interest in his purchase of the sponsored product, "no longer selects his brand of TBA solely on the basis of the comparative merits of the competing products" because he purportedly *feels* constrained to "acquiesce in Texaco's recommendation" in the absence of strong countervailing factors (P. Br. 23), thereby foreclosing competition. Petitioner argues that this is true even though Texaco does not coerce or pressure its dealers to buy the sponsored product and the dealer is in fact free to buy whatever brand of TBA he desires.

This theory patently is not the rationale of *Atlantic* (Point A, *infra*). What is more, there is no evidential foundation for invoking any such theory in this case; on the contrary, the evidence of record and findings of the court below completely refute the theory (Point B, *infra*).[11] There is no proof that Texaco dealers do not purchase TBA on the basis of what they conceive to be the relative merits of the various brands; or that they "feel constrained" to buy the sponsored product absent unspecified "strong countervailing factors." What the record does show is that when it comes to buying TBA, Texaco dealers are free, they know they are free and they repeatedly exercise their freedom to purchase non-sponsored products without jeopardizing their dealerships or in any way incurring Texaco's ill will.

---

[11] That being so, there is no occasion for the Court to address itself to the question of whether the theory can be raised in this Court in view of the fact that it goes beyond the teachings of the *Atlantic* case and therefore exceeds this Court's mandate. Nor is there any occasion to consider whether the theory, even if properly raised, is sound as a matter of law, since the evidence necessary to sustain it is lacking.

The Commission was not warranted in concluding that Texaco had violated Section 5—either under the standards of *Atlantic* or any other permissible application of the statute.

ARGUMENT

The Court of Appeals Correctly Decided This Case

A. Application of *Atlantic* to the Facts of This Case, in Accordance with This Court's Mandate, Required Dismissal of the Complaint

1. The *Atlantic* Decision

The gravamen of the violation in *Atlantic* was Atlantic's concededly coercive practices whose successful employment produced demonstrable anticompetitive effects. This was the basis upon which *Atlantic* was presented to this Court by the Solicitor General [12] and upon which this Court's decision rested.

The Court made this unmistakably clear in its treatment of the matter of relief. The whole point of Part V of the *Atlantic* opinion was to justify the *breadth* of the order precisely because it was *not* limited to the conduct held unlawful—the *coercive* use of the plan. Atlantic had strenuously argued that the order should enjoin only the use of coercive tactics. This argument was rejected by the Court but not because non-coercive use of the plan was itself a violation of law. It was rejected because of the settled principle of administrative law that permits an agency to forbid lawful conduct which it deems necessary for

[12] See *infra*, p. 31.

effective relief against *proven illegal conduct.* The Court stated that it did not

> "believe that the order is *too broad.*[18] Section 5(b) empowers the Commission to issue a cease-and-desist order against anyone using an unfair method of competition in commerce. The Commission was of the opinion that to enjoin the use of overt coercive tactics [*i.e.,* the unfair method of competition alone] *was insufficient.* We think it was justified in this conclusion. *The long existence* of the plan itself, *coupled with the coercive acts* practiced by Atlantic pursuant to it, warranted a decision to *require more*" (381 U.S. at 372; emphasis added).

The words "require more" in this context are especially significant. When all that is done is to forbid the conduct held unlawful, it is patent that "more" is not being required.

Moreover, if the Court believed that there was anything inherently violative of Section 5 in TBA sales commission plans when entered into by a major oil company, it would not have justified the order prohibiting such agreements on the basis of the "long existence of the plan itself, *coupled* with the coercive acts practiced by Atlantic" (emphasis added).

The only basis for the conclusion of illegality recognized by the Court was that Atlantic had successfully "marshaled its full economic power in a continuing campaign *to force* its dealers and wholesalers to buy Goodyear products" with

[18] If the order had enjoined only *illegal* conduct, of course, there would have been no question about its scope. Because it prohibited *lawful* conduct it was necessary for the Court to decide whether it was "too broad."

a concomitant detrimental impact on competition (381 U.S. at 371; emphasis added).

This is fully buttressed by other unambiguous expressions throughout the majority opinion. Thus, in referring to the order against Goodyear, the Court again emphasized that what "outlaws the commission plan" is not "the oil company's power" alone but in addition its *"overt acts toward its outlets"* (381 U.S. at 373; emphasis added). The crux of the decision as to Goodyear is contained in the following sentences:

> "Nor is it any objection for Goodyear to claim that it did not exert any *overt coercive pressures* on the oil companies' outlets. It is of little consequence that *Atlantic actually applied the pressure.* For so close was the teamwork of the two companies that, even with blinders on, Goodyear could not have been ignorant *of those practices*" (381 U.S. at 376; emphasis added).

With respect to *"the manner in which this sponsorship was carried out,"* the Court concluded that:

> "the most impressive evidence of its effectiveness was its undeniable success within a short time of its inception. In 1951, seven months after the sales-commission plan had gone into effect, Goodyear had enjoyed great success in signing contracts with Atlantic dealers despite the fact that a 1946-1949 survey had shown that 67% of the dealers had preferred Lee tires and 76% Exide batteries" (381 U.S. at 368-69).

It was "[w]ith this background in mind"—of coercive practices and quick success against contrary dealer prefer-

ence—that the Court went on to consider whether there was a "reasonable basis in law" for the finding of illegality (381 U.S. at 369).

The Court found that there was such a basis by analogy to a tying scheme. The analogy was justified on the ground that the competitive effects of the conduct of Atlantic and Goodyear were comparable to those resulting from a tying arrangement.[14]

In a tie-in case, of course, it is not mere persuasion or salesmanship to induce purchasers to buy two products which is prohibited,[15] but the *requirement* that in order to obtain one the purchaser must take the other as well. The core of a tie-in is the *requirement* imposed upon the buyer. The Court concluded that Section 5 had been violated in *Atlantic* because "the effect of the plan was *as though* [emphasis is the Court's] Atlantic had agreed with Goodyear *to require* its dealers to buy Goodyear products *and had done so*" (381 U.S. at 370; emphasis added).[16]

The Court presumably rested its decision on this narrow ground not only because the Solicitor General did not ask it to go farther but also because to have done so would have raised extremely serious constitutional questions with respect to the authority of the Federal Trade Commission to

---

[14] The Court reiterated the anticompetitive effects found by the Commission: division of markets, restricted supply points and foreclosure (381 U.S. at 370).

[15] *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 6 n.4 (1958): "Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price."

[16] Indeed, the evidence showed and the Commission found that Atlantic had imposed tie-ins on some of its dealers (58 F.T.C. at 363-64).

impose curbs upon mere speech absent coercion,[17] and to depart so far from traditional antitrust principles in prohibiting legitimate business operations as to be without "reasonable basis in law" (381 U.S. at 367) and thereby violate due process guarantees. These questions were

[17] This Court has always been alert to the fact that antitrust considerations do not override First Amendment rights. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). It has been equally firm in recognizing that "the rights of free speech and a free press are not confined to any field of human interest" and that the "idea is not sound therefore" that such safeguards are "inapplicable to business or economic activity." *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945). Moreover, this Court, as well as the lower Federal Courts, have repeatedly made clear that, absent coercion, the use of speech to persuade to action—even in an economic context when the party seeking such action has power over the listener —is a fully protected Constitutional right.

> " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.***
>
> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." (*id.* at 537).

See also, *e.g.*, *NLRB* v. *United Steelworkers*, 357 U.S. 357, 362 (1958); *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941); *NLRB* v. *Laars Engineers, Inc.*, 332 F.2d 664, 667 (9th Cir. 1964), *cert. denied*, 379 U.S. 930 (1964); *NLRB* v. *M&B Headware Co.*, 349 F.2d 170, 172 (4th Cir. 1965); *NLRB* v. *Collins & Aikman Corp.*, 338 F.2d 743 (5th Cir. 1964); *NLRB* v. *Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946); *Edward G. Budd Mfg. Co.* v. *NLRB*, 142 F.2d 922 (3d Cir. 1944); *Jacksonville Paper Co.* v. *NLRB*, 137 F.2d 148 (5th Cir. 1943), *cert. denied*, 320 U.S. 772 (1943). As long as non-coercive promotional efforts are neither false nor misleading—and there was no contention by the Commission that Texaco's promoting the sale of sponsored TBA involved any untruthful statements—such promotional efforts are directly within the constitutional free speech guarantees. See *e.g.*, *Regina Corp.* v. *FTC*, 322 F.2d 765, 770 (3d Cir. 1963); *E. F. Drew & Co.* v. *FTC*, 235 F.2d 735, 740 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).

avoided by reliance upon coercion and the analogy to tie-in selling—*i.e.*, to the situation where someone is being *forced* to buy a product against his will. The Court unmistakably declined to go any further.

2. The Basis for Affirmance of the *Atlantic* Order Urged by the Solicitor General

The Court's holding in *Atlantic* is illuminated by what it was asked to do by the government on oral argument.

When closely questioned by various members of the Court, the Solicitor General specifically disclaimed seeking a ruling that TBA sales commission plans are unlawful absent coercive exercise of economic power by the oil company.

He was explicit that it was not claimed that the sales commission arrangement itself was inherently unlawful:

> "* * * if you had just the contract standing alone, you could not say on its face that this is bad, *it depends on what they would do about it.*" (Transcript of Oral Argument Before Supreme Court, *Atlantic Refining Co.* v. *Federal Trade Commission*, p. 72).

In this connection Justice Brennan observed:

> "* * * there is no contention of the Government that the sales commission contract in and of itself ran afoul of such a provision [Section 5], it is only *the performance under the contract,* the method of operation." (*id.* at 80).

The Solicitor General agreed with Justice Brennan that:

> "* * * the Government does not suggest that there may not be commission sales arrangements which would satisfy Section 5." (*id.* at 80).

The Solicitor General informed the Court that he was not contending that economic power plus mere recommendation was sufficient to invalidate the plan:

> "Justice White: . . . That is the real nub of your argument, I gather, that companies can't recommend and at the same time have this power.
>
> "Mr. Friedman: They can't recommend it *in the way in which they recommend it here.* I think again it is a matter of degree basically" (*id.* at 81).

The Solicitor General made it clear that he was not asking the Court to predicate illegality upon the fact that there was a disparity of economic power between Atlantic and any of its dealers but rather upon the improper exercise of such power—not upon the mere existence of Atlantic's leases but rather upon the improper use to which Atlantic put them. Thus counsel stated:

> "* * * in this case we have the power and its use" (*id.* at 52).
>
> * * *
>
> "[T]he basis on which the Commission's decision holding the Atlantic contract to be invalid rests is the power that Atlantic has, *and the fact that in these circumstances the power is brought to bear*" (*id.* at 82).

In speaking of the exercise of power, the Solicitor General emphasized that he was referring not to salesmanship but to pressure and coercion:

> "* * * in this case we have the power and its use. I don't think I have to take on the more difficult case, *if we didn't have the actual use of the power.*

> "Justice Brennan: The power and the use with pressure, not power and the use meaning coercion?
>
> "Mr. Friedman: *Power and use meaning pressure, with some coercion*" (*id.* at 52).

Upon further questioning, counsel reaffirmed the importance of Atlantic's use of its power:

> "Justice White: And he [the Atlantic dealer] is coerced?
>
> "Mr. Friedman: He is coerced, he is coerced in fact" (*id.* at 56).
>
> * * *
>
> "Justice Stewart: The pressure put upon them?
>
> "Mr. Friedman: Coercive pressure, threats of lease cancellation" (*id.* at 58).
>
> * * *
>
> "Justice Stewart: They were under coercion?
>
> "Mr. Friedman: They were under coercion" (*ibid.*).

The Solicitor General stressed that it was the totality of Atlantic's improper conduct which caused the proven anticompetitive effects:

> "If I may, I would like to show what they actually did in this case, and then to suggest why there may very well be situations where *eliminating some of the things they did in this case would not have the same adverse effect on the competition* as the plan the Commission condemned" (*id.* at 48-49).

With respect to the matter of relief, the Solicitor General argued for the outlawing of TBA sales commission arrangements by Atlantic not because of their intrinsic

illegality, and not because they could not be employed in a non-coercive manner, but solely because in his view such relief was a remedial necessity in order to remove the effects of Atlantic's *longstanding* coercive imposition of sponsored TBA upon its dealers. An order which merely enjoined Atlantic's coercive conduct, counsel urged, would be "an inadequate remedy" (*id.* at 64).

Justice White commented:

> "So that is your theory now, that is the Government's position is that *without their coercion in the record, no case?*" (*id.* at 64).

To which counsel responded:

> "I just don't know, Mr. Justice, whether without any evidence of coercion as I use it, pressure in that sense, I would think it would be very doubtful whether the Commission would have brought this case. But again, I don't know" (*ibid.*).

As we have seen, the Court accepted the government's invitation to decide the case on its specific facts.

3. Pursuant to the Mandate, the Court of Appeals Faithfully Applied *Atlantic* to the Facts of This Case

One week after *Atlantic*, the Court remanded this case for further proceedings "in light of *Atlantic*" (381 U.S. 739, 740 (1965)). At the oral argument on remand to the FTC, Commissioner Jones properly summed up the import of the *Atlantic* decision in the course of responding to complaint counsel's expression of a personal predilection for a *per se* rule:

> "I am not sure that is relevant, counsel, to whether these products have been *imposed on unwilling pur-*

chasers, which I think is the vice of this arrangement. I think this is what the Court is saying when it says it is not per se illegal. It says it is illegal if it *in fact coerces people to do something that they otherwise would not want to do, and therefore it keeps out non-sponsored TBA manufacturers*" (A. VI. 63; emphasis added).[18]

Nevertheless, when it issued its decision half a year later, the Commission, disregarding the principles of *Atlantic*, ruled that the absence of coercion here was beside the point and held in effect that the sales commission plan was illegal *per se.*

The Court of Appeals, on the other hand, pointed out:

> "If the Supreme Court concluded that the sales commission was inherently illegal when entered into by a major oil company, it would have had no occasion to take cognizance of the coercive practices and no remand of this case would have been required. Yet the Atlantic opinion is replete with references to these practices and *we cannot escape the conclusion that the overt coercive acts practiced by Atlantic*

---

[18] Complaint counsel also evinced no difficulty in understanding that the gravamen of *Atlantic* was coercion. His brief to the Commission upon remand from this Court began with the following statement:

> "The Supreme Court in its recent Atlantic/Goodyear decision, affirming the 7th Circuit's decision and Order in the same case, relied upon that Court's *finding of coercion* based upon facts 'which are so carefully examined in the opinion of the Court of Appeals.'
>
> "Thereafter the Supreme Court commented on various other facets of the case including the relationship between the various parties; the plan and its competitive effect; the role and liability of the rubber company and scope of order." (Supplemental Brief of Counsel Supporting the Complaint, August 9, 1965, p. 1; emphasis added).

were deemed essential to the ultimate action of the Court. It is surely of some significance that in almost every page of the *Atlantic* opinion there is some such reference, e.g., 'overt acts,' 'overt coercive pressures,' 'direct and overt threats,' etc., 381 U.S. at 368, 373, 376.

* * *

"If the Supreme Court viewed its holding in *Atlantic* as treating contractual arrangements between the oil company and its dealers in and out of themselves as giving rise to controlling economic power, and that *mere salesmanship without any coercion* constituted unlawful exercise of such power, there would have been nothing to remand. The Supreme Court could have simply reversed and reinstated the Commission's order" (A.VI. 112-13; emphasis added).

In arguing that *Atlantic* was not predicated upon the use of coercion, petitioner quotes from this Court's opinion to the effect that "illegal 'effects on competition flowed from the contract itself.' (381 U.S. at 370)" (P. Br. 18). The quotation is totally out of context. The Court at that point was dealing with (1) the fact that "Firestone and Goodyear were excluded from selling to Atlantic's dealers in each other's territories" and (2) the fact that "even Goodyear wholesalers who were not authorized supply points were foreclosed from the Atlantic market." It was with respect to these two restraints that the Court stated:

> "*Both of these* effects on competition flowed from the contract itself" (381 U.S. at 370; emphasis added).

Neither of these effects have anything whatever to do with Texaco's sales commission plan. Goodrich and Firestone

are not excluded from any territory and there are no authorized supply points under Texaco's plan. Petitioner's quotation, accordingly, has absolutely no application here.[19]

In sum, coercion cannot be read out of *Atlantic* and the decision of the Court of Appeals on the matter of interpretation was entirely correct.

B. The Facts of This Case Do Not Fit Any Theory of Illegality

As previously noted, the Court of Appeals did not rest its decision on the absence of coercion (*supra*, pp. 19-20). It concluded, on the basis of an exhaustive review of the record and giving full effect to the Fifth Circuit's decision in *Shell*, that Texaco, unlike Atlantic and Shell, *made clear that its dealers were free to accept or reject sponsored products without incurring Texaco's displeasure; and that Texaco practiced what it preached.* This distinction between Texaco's conduct and that of the other two companies is critical, negating two essential elements of the government's case: (a) the exercise of dominant economic power and (b) resulting anticompetitive effects.

1. Texaco Did Not Exercise Dominant Economic Power Over Its Dealers to Cause Them to Buy Sponsored TBA

The Court of Appeals concluded that this record does not permit a finding that Texaco exercised economic power over its dealers (A.VI. 114-15). Petitioner, acknowledging this fact, argues:

> "While the court below set aside the Commission's ultimate finding that Texaco had exercised its domi-

---

[19] Petitioner also mistakenly relies on this part of the Court's opinion at page 24 of its brief.

nant economic power, it did not disturb the bulk of the supporting findings with respect to promotion by Texaco of Goodrich TBA. In particular, the court did not question that the Texaco salesman continually carries the promotional message in his day-to-day contacts with dealers. Nor did the Court question the use of statistics on sponsored TBA purchases in evaluating a dealer's performance. But these are highly effective means of exercising economic power, for they go directly to the continuation of the economic relationship between Texaco and the dealer" (P. Br. 22).

The Court of Appeals did not question the use of statistics on sponsored TBA purchases in evaluating a dealer's performance for the simple reason that *there was never any such use.* Texaco never policed its dealers' TBA purchases in any manner[20] and such purchases have never been relevant to the continuation of the economic relationship between Texaco and any dealer. The only reports Texaco receives are accounting tabulations relating to the commission amounts owing to Texaco and used solely for accounting

---

[20] The Court of Appeals found:

"(3) *Dealer Policing and Credit Cards.* In *Atlantic* the Supreme Court was confronted with evidence that Atlantic imposed quotas on dealers and effectively policed them by the use of a reporting system of purchases and sales of TBA. In the original appeal to this Court, the Commission contended that the quota and policing system were also used by Texaco. In the present appeal the Commission has retreated from this position. As to credit card policy, the Examiner carefully distinguished the *Atlantic* record from the instant record and significantly found that Texaco does permit dealers to charge *non-sponsored* TBA on its credit cards" (A.VI. 115).

purposes (A.I. 460).[21] Thus, the statement in petitioner's brief quoted above is palpably erroneous.[22]

This leaves, as the sole asserted basis for concluding that Texaco *exercised* economic power over its dealers, the bare fact that it recommended sponsored TBA to them. In view of the uncontested finding that Texaco's policy and practice have been to permit each dealer to choose whatever brand of TBA he may desire, this boils down to the contention that, as a matter of law, Texaco cannot recommend. A Texaco recommendation, in the government's view, constitutes an exercise of economic power because recommenda-

[21] Since Texaco's dealers, unlike Atlantic's and Shell's, were not limited in their sponsored TBA purchases to any single supply point but were free to purchase from any source, the possibility of accounting errors and omissions was substantial (A.II. 1314-16).

[22] While the brief offers no citation to support the statement at page 22, petitioner presumably is relying upon the exhibit appearing at A.IV. JAX 49, cited at page 7 of its brief. At page 7, after referring to the accounting reports received by Texaco, petitioner's brief states:

> "Thus Texaco is informed of each *dealer's* purchases, and considers this fact in evaluating *service stations* when deciding whether to renew *their leases*" (P. Br. 7; emphasis added). See also P. Br. 16.

JAX 49 is a letter from a Texaco employee responsible for leasing properties *for* Texaco from land owners. In evaluating whether Texaco, as a lessee, should renew a lease with such an owner, he had to know what relation the rental cost to Texaco bore to the amounts Texaco earned through use of the leased premises. In this exhibit the employee was requesting information on the TBA commissions earned at these leased properties so that these amounts could be included in the equation, "thereby reducing the cost" and possibly justifying Texaco's continued rental of the premises. This employee had nothing whatever to do with dealer evaluations and the matter was wholly unrelated to the relationship between Texaco and its dealers (A.I. 318-22, 324).

tion apprises the dealer that Texaco has an interest in his purchasing the sponsored product:

> "Where, as here, the effect of the promotional activities of the oil company is to make its dealers *aware* that the company has a direct interest in their purchase of sponsored TBA, it was reasonable and proper for the Commission to conclude that the oil company has exercised its economic power" (P. Br. 22; emphasis added).

To equate dealer awareness with exercise of economic power is tantamount to saying that no proof of exercise is necessary beyond the fact that the oil company entered into a sales commission agreement which it performed—*i.e.*, that the agreement is *per se* unlawful, since it cannot be carried out lawfully. This is a far cry from the holding of *Atlantic* and it is not a permissible application of Section 5.

The contrast between this record and that in *Atlantic* on the question of exercise of dominant economic power is dramatic. None of the salient facts which this Court relied upon in finding that Atlantic had "marshaled its full economic power in a continuing campaign to force its dealers and wholesalers to buy" sponsored TBA (381 U.S. at 371) are present here.

a. *Dealer Policing.* Atlantic exercised its economic power through a complex program of dealer policing and surveillance to totally eliminate resistance to Goodyear TBA. *Not a single policing device was ever employed by Texaco.*

Thus Atlantic had dealer TBA quotas for sponsored products;[23] it controlled the placement of advertisements

[23] 381 U.S. at 365; see also 331 F.2d at 399. Texaco did not have any such quotas.

by its dealers;[24] it enlisted the help of Goodyear in identifying recalcitrant dealers;[25] it employed phantom inspectors;[26] and it received reports on its dealers to detect non-sponsored TBA purchases.[27] There has never been a

[24] Atlantic controlled "all advertising on the premises of its dealers" and "permitted no signs or displays other than those of sponsored products" (381 U.S. at 368, 365 n. 7). Atlantic's authority to prevent dealers from advertising non-sponsored TBA "was a powerful weapon in preventing them from handling such products" (Brief of Solicitor General to the Supreme Court, Atlantic Refining Co. v. Federal Trade Commission, at p. 42). Such authority derived from a provision in its dealer leases requiring the lessee to have Atlantic's prior written consent before placing any signs on or removing them from the leased premises (*id.* at 11). Atlantic's lessees were also required to sign a separate document defining standards of operations —the "Eleven Point Lease Letter"—which included a standard entitled "Display" (58 FTC at 338).

Texaco's leases contain no such provision and the record is replete with evidence that Texaco dealers freely advertised and displayed non-sponsored TBA. For example, in Texaco's Dallas Division, 233 pictures were taken of Texaco stations, at which there were displayed 40 different types of non-sponsored batteries (A.V. JAX 547-88).

[25] "Goodyear also furnished, this time at the specific request of Atlantic, a list of the latter's recalcitrant dealers who refused to be identified with the 'Goodyear program'. These lists Atlantic forwarded to its district offices, for 'appropriate action'. On one occasion a list of 46 such dealers was furnished Atlantic officials by Goodyear.*** [A]ll soon fell into line. This is a particularly impressive example of Goodyear's inclination to use Atlantic's power for its own benefit" (381 U.S. at 366, 374).

Goodrich never furnished, and Texaco never requested, any such list.

[26] Atlantic engaged "Phantom Customer Inspectors" to enforce its policing activities (58 FTC at 339; 331 F.2d at 396). The success of Atlantic's TBA efforts stemmed from "the effective policing of the plan" (381 U.S. 366).

Texaco had no such inspectors.

[27] This Court viewed Goodyear's reports to Atlantic, "when considered alongside the admitted overt coercive practices of Atlantic," as "a potent device in ensuring the success of the program" (381 U.S. at 374).

Goodrich reports to Texaco, by contrast, were simply used to provide a record of the commission amounts owing to Texaco.

finding of such policing by Texaco—and no such evidence exists in the record.

b. *"Dual Solicitation."* In *Atlantic* double-teaming was "heavily-relied" upon by the parties to "take stock orders, furnish initial price lists and project future quotas of purchases of Goodyear products" (381 U.S. at 365). In addition, this Court noted that " 'Goodyear thus appeared confident that the presence of an Atlantic salesman together with the Goodyear representative would render unnecessary any higgling or haggling over price *before* obtaining an initial order for TBA from Atlantic dealers' " (381 U.S. at 375).

Texaco's record on joint visits is quite another matter. First, there was no regular practice of having a Texaco salesman accompany a rubber company salesman; at most it was a sporadic practice undertaken, on occasion, for introductory purposes or when the dealer requested special assistance (A.I. 336, 377, 462-63, 723-24; A.II. 1361, 1540, 1650).[28]

Furthermore, Texaco's joint visits could have had no conceivable relation to the price of TBA. The Atlantic dealer was assigned to a designated supply point (58 FTC at 350). Hence he was compelled to purchase TBA at that particular wholesaler's price.[29] But since the Texaco dealer

---

[28] Moreover, since no territories were assigned exclusively to Goodrich or Firestone in the Texaco TBA program, the role of a Texaco salesman accompanying a salesman of one of these rubber companies necessarily was a neutral one.

[29] The Commission, in detailing the testimony of Atlantic dealer Balloran, quoted him to the effect that although he could have purchased Goodyear tires at a cheaper price from another Goodyear supplier, against his will he purchased from his designated supply point at a higher price (58 FTC at 361).

could select any source of supply he had complete freedom of bargaining with respect to price.[30]

c. *"Advance Notification."* The *Texaco* record discloses that advance notification was a rare occurrence—not a regular procedure (A.I. 373, 456-57; A.II. 1118, 1147).[31] Texaco would communicate with the rubber companies only after the new dealer himself had indicated his interest in a particular brand of sponsored TBA (A.I. 723; A.III. 2074). Moreover, such communications played little or no role in furthering sponsored TBA purchases. Thus, in the year prior to the Commission's hearings in Atlanta, Goodrich sold TBA to seven new Texaco dealers, only one of whom was identified by Texaco before Goodrich contacted him (A.II. 1148-51).

d. *Geographical Supply Points.* Atlantic assigned its dealers to a single point of TBA supply. By contrast, as the Court of Appeals noted, in this case "the Examiner found that as to sponsored TBA sales, each dealer did not buy exclusively from, and was not limited to, any particular supply point but was free to deal with any source he chose" (A.VI. 115).

---

[30] For example, Texaco dealer O'Brien, who was dissatisfied with his original source of sponsored products, switched to another source (A.II. 1427-29).

[31] *Atlantic*, of course, did not condemn "advance notification" as such. It was cited only as evidence of Goodyear's "close cooperation" with Atlantic in connection with making the order applicable to the rubber company (381 U.S. 373-74)—after the Court had determined from other evidence that Atlantic's conduct had violated Section 5.

e. *Sales Practices.* Again, in contrast to the all-out efforts of Atlantic to cause its dealers to purchase only sponsored TBA, here the Court of Appeals noted:

> "* * * the Commission itself in the order presently under review struck the Examiner's finding that Texaco 'salesmen were encouraged by [Texaco] management to write up orders for sponsored TBA without waiting for a formal request from a dealer'" (A.VI. 114).

f. *Retaliation.* In *Atlantic,* this Court pointed out:

> "The Commission stressed the evidence showing that 'Atlantic dealers have been orally advised by sales officials of the oil company that their continued status as Atlantic dealers and lessees will be in jeopardy if they do not purchase sufficient quantities of sponsored' tires, batteries and accessories. * * * Indeed, *some dealers lost their leases after being reported for not complying with the Goodyear sales program*" (381 U.S. at 366-67; emphasis added).

As the court below observed, this coercive context permeated the entire Atlantic program, contaminating even the oil company's neutral conduct (A.VI. 112). For the actual lease cancellations and other reprisals vividly demonstrated to Atlantic's dealers that, if they ignored a simple recommendation, they would ultimately be confronted with real coercion. In the case of Atlantic's dealers, the Seventh Circuit found that "... there exists a servitude caused by the coercive pressures which Atlantic exerts upon its dealers." *Goodyear Tire & Rubber Co.* v. *FTC,* 331 F.2d 394, 400 (7th Cir. 1964). It noted: "In that setting, recommendation is tantamount to command" (*id.* at 401).

Texaco's program, by contrast, concededly was never accompanied by lease cancellations or threats of reprisals. If Texaco's dealers ignored TBA recommendations, as most of them did, there was no retaliation whatsoever.

g. *"Effectiveness."* The most "impressive evidence" of the effectiveness of Atlantic's exercise of its economic power was the remarkable switch of Atlantic dealers to Goodyear TBA (381 U.S. at 368). An Atlantic survey between 1946 and 1949 showed that 67% of its dealers preferred another brand of tires and 76% another brand of batteries (*id.* at 368-69). Yet in 1951, "[w]ithin seven months after the agreement Goodyear had signed up 96% and 98%, respectively, of Atlantic's dealers in two of the three areas assigned to it" (381 U.S. at 366). And, as the Commission's opinion pointed out, two months later "an Atlantic report showed that *virtually all* Atlantic dealers in Goodyear's assigned territory who were potential purchasers of TBA had signed contracts agreeing to handle Goodyear products" (58 F.T.C. at 346; emphasis added).

In diametrical opposition, although Texaco's program had been in effect for well over a decade before Atlantic's was even commenced, most Texaco dealers still did not purchase any sponsored TBA. The only comprehensive statistics in the record—and these were introduced by Commission counsel—demonstrate that approximately two-thirds of Texaco dealers do not regularly purchase any sponsored tires and 80% do not regularly purchase sponsored batteries and accessories (A.IV. JAX 177-180).[32]

---

[32] These percentages were compiled as follows: Texaco has 38,000 dealers, 30,000 of whom have a contractual relationship with Texaco (A.I. 426). The statistical charts in question contain data concerning the purchases of only those 30,000 dealers with whom Texaco

In the face of these statistics, it is small wonder that the Commission expressly discarded the "effectiveness" of Texaco's program as a basis for its decision (A.VI. 92).[33]

---

has a contractual relationship—i.e., those dealers whom Commission counsel contended were subject to Texaco's control. These charts list the total number of Texaco's contract and lessee dealers (by division) and the *number* of these dealers (again by division) who purchased a dollar or more of TBA under each sales commission arrangement (*id.* at 430, 433-34). When a station bought from both sponsored TBA suppliers (Goodrich and Firestone), it was listed twice. By adding the number of stations purchasing under the Goodrich plan to the number of stations purchasing under the Firestone plan, we find that a maximum of 11,000 Texaco contract and lessee dealers bought a dollar or more of sponsored tires during any month of 1955 and 1956. (This 11,000 figure is inflated because many Texaco dealers bought from both Goodrich and Firestone and would therefore be counted twice in the computations.) Since there are approximately 30,000 Texaco contract and lessee dealers, it is evident that only one out of three Texaco dealers buys sponsored tires. And the comparable percentage for Texaco dealers purchasing sponsored batteries and accessories is a mere 20%.

[33] Although the Commission made no differentiation between Texaco's lessee and contract dealers for any other purpose—combining the two groups to show the number of outlets affected, the dollar volume of sponsored TBA purchases, and so forth—its only comment with respect to the statistics set forth in the text was to suggest that the contract dealers should be eliminated from consideration because "*many* contract dealers do not handle, and are not appropriate outlets for, TBA products" (A.VI. 92). Even if *all* of the 16,806 Texaco contract dealers are disregarded, however, it remains indisputable that Texaco did not force anyone to do anything against his will. It is simply impossible to square the theory that an oil company-dealer relationship is necessarily "inherently" coercive absent proof thereof, with the fact that of Texaco's 13,366 lessee dealers at the end of 1955 —after the program had been in effect for more than fifteen years—11,913 didn't buy a single Goodrich battery and 11,202 didn't buy a single Firestone battery (A.IV. JAX 179-80)! Some 10,000 of 13,000 lessee dealers thus freely disregarded Texaco's recommendation and were wholly immune to its salesmanship.

Shell's practices were also markedly different from those of Texaco.[84] Although the Fifth Circuit rejected the Commission's finding of overt coercion by Shell, it pointed out that the evidence did "show the 'dramatic and immediate' anticompetitive pressures on dealers" (360 F.2d at 483-84). Not only were Shell's dealers not free to purchase whatever brand of TBA they desired from any source but, as the Court of Appeals found:

> "The evidence, however, shows that each Shell dealer was expected to choose between the two sponsored suppliers *to the exclusion of all others.* Once the dealer chose one company, the other company did not compete for any part of the dealer's business" (*id.* at 483; emphasis added).

Moreover, each Shell dealer was assigned to a specific wholesale supply point and no sales commissions were paid to Shell on TBA purchases from non-designated supply points, even though the brand acquired might be the same. Under

[84] For example, the Commission's *Shell* decision referred to the need for assessing the evidence against Shell

> "*** in the light of subpoenaed correspondence taken from the files of Shell relating to the TBA sales objectives of the Shell company. A memorandum entitled 'T. B. A. Situation' written by a Division Department Manager of Shell and addressed to his District Managers contains this statement:
> "*** Presently our dealers are purchasing far too many mongrel brands. Profits on batteries are very attractive to the dealers and the battery buying season is just ahead. *Let's keep these low-priced and troublesome batteries out of our stations.* Both our suppliers are well-stocked, and both Goodyear and Firestone have just recently announced attractive . . . terms on batteries. WE NEED THIS BATTERY BUSINESS!" 58 F.T.C. at 395 (emphasis added).

There is absolutely nothing comparable in the *Texaco* record.

these circumstances, "double teaming" was a regular and highly effective tactic since the Shell salesman was far from neutral.[35] Equally important, in contrast to Texaco, Shell policed its dealers to stamp out non-sponsored TBA and assigned sponsored TBA quotas to its dealers (*id* at 481). Thus, in *Shell*, there was definite evidence to support the conclusion that it exercised power over its dealers.

Here, *per contra*, the Court of Appeals drew the only conclusion that could be drawn from the record before it: that Texaco did not exercise dominant economic power over its dealers.[36]

2. Texaco's Sales Commission Plan Produced No Adverse Competitive Effects

As we have seen (*supra*, pp. 21-2), the Court of Appeals further found no basis in the record for concluding that Texaco's sales commission plan produced any adverse competitive effects (A.VI. 115-19).

Integral to this Court's determination of illegality in *Atlantic* was the showing that "the activity of Goodyear and Atlantic impaired competition at three levels of the tires, batteries and accessories industry"—manufacturing,

---

[35] The Fifth Circuit noted:

> "The activity considered most valuable and relied upon to bring fast results is 'double teaming' by salesmen from Shell and Firestone or Goodyear. *** when a TBA representative finds difficulty in moving his line to a nominated dealer, he calls upon the Shell salesman to accompany him on his sales rounds *** to no one's surprise, the team produces excellent results" (*id.* at 482 n. 24).

[36] In light of this finding, no purpose would be served by challenging that court's conclusion that Texaco had dominant economic power over its dealers.

wholesaling and retailing (381 U.S. at 370). But not a single anticompetitive effect found in *Atlantic* is present here.

First, in *Atlantic* there was a classic division of territories between Goodyear and Firestone:

> "* * * Firestone and Goodyear were excluded from selling to Atlantic's dealers in each other's territories" (381 U.S. at 370).

Atlantic's contracts made explicit provision for this division of territories (*ibid.*). Not only is there no like provision in the agreements between Texaco and Goodrich and Firestone, but the record is clear that in practice there was no division of territories.

The absence of any division of markets or customer allocation, together with the active competition of all TBA suppliers, including three substantial sponsored TBA manufacturers,[87] for the business of the local Texaco dealer, precludes the possibility that Texaco was handing over a "captive market" to Goodrich or to any other TBA supplier.[88]

Second, this Court pointed out that

> "* * * Goodyear wholesalers who were not authorized supply points, were foreclosed from the Atlantic market" (381 U.S. at 370).

No supply points were designated here. The Examiner expressly found that the Texaco dealer is "free to deal with any Goodrich supply point he may prefer" (A.I. 219; A.VI. 115, 118).

---

[87] In 1956 Texaco added U.S. Rubber as a third sponsored TBA company (A.II. 1136; A.III. 2371, 2373; A.VI. 55, 57).

[88] In *Atlantic,* the Court observed that "Goodyear had in effect purchased a 'captive market'" (381 U.S. at 375).

Third, this Court observed that Atlantic's

> "dealers could buy only at Goodyear's price" (381 U.S. at 370).

This adverse effect flowed directly from the territorial division of markets and the designation of supply points. Since the Texaco dealer wishing to purchase a sponsored TBA brand can freely select any supply source from three of the largest TBA manufacturers, price dictation is simply impossible in this case.

Finally, the foreclosure brought about by Atlantic's coercive conduct was virtually total:

> "They [Atlantic wholesalers and retailers] . . . were effectively foreclosed from selling brands other than Goodyear" (381 U.S. at 370).
>
> * * * *
>
> "[W]holesalers and manufacturers of competing brands . . . were foreclosed from the Atlantic market" (*ibid.*).

Here, by contrast, *there is no foreclosure whatever.* Since Texaco dealers are free to buy whatever TBA brands they desire, it necessarily follows that neither they nor competing suppliers are foreclosed from any market by reason of the operation of the Texaco sales commission plan. Thus, Texaco's plan imposes no anticompetitive restrictions on anyone.

Contrary to its position in *Atlantic* and *Shell*, the government here rests its case solely on the claim of foreclo-

sure (P. Br. 23),[39] making no charge of any other anticompetitive effect. Since Texaco did not restrict the free choice of its dealers, the government is relegated to the argument that:

> "Once he recognizes that Texaco favors the purchase of sponsored products, the dealer, even if he is not coerced, no longer selects his brand of TBA solely on the basis of the comparative merits of the competing products. In the absence of strong countervailing factors the dealer is most likely to acquiesce in Texaco's recommendation to purchase the sponsored product" (P. Br. 23).

This, says the government, is because Texaco dealers, though not in fact restricted, may be concerned that Texaco would disapprove of their purchase of non-sponsored TBA (P. Br. 24).

We need not pause to quarrel at length with the government on the law[40] because the crushing answer to petition-

---

[39] In *Shell,* the Fifth Circuit found that Shell's dealers were not free to purchase any brand of TBA they desired to sell and the two rubber companies involved were also restricted from competing with each other for the business of Shell dealers.

> "As in *Atlantic,* competition was impaired at three levels. (a) Wholesalers and manufacturers of competing brands were foreclosed from Shell's market. Even Firestone dealers who were not authorized supply points were cut off from Shell's outlets. (b) Firestone and Goodyear were excluded from competing with each other after a dealer had selected his supplier. (c) Shell's dealers, who were limited to sponsored TBA were placed at a competitive disadvantage in having to compete with dealers free to stock several brands of TBA." *Shell Oil Co.* v. *FTC,* 360 F.2d 470, 484 (5th Cir. 1966).

[40] *Atlantic* will be searched in vain for any intimation, much less holding, that foreclosure can be bottomed on the *groundless* fears of dealers that the oil company will look askance at their purchase of non-sponsored TBA—no matter what the oil company says or does to make clear that its dealers are perfectly free to choose whatever brands of TBA they desire.

er's argument lies in the facts. All the government offers us is *ipse dixit;* there is nothing in the record to support its conjectures.

Where, we may ask, is there proof that Texaco dealers do not purchase TBA on the basis of the relative merits of the particular brands? That there must be "strong countervailing factors" before Texaco dealers will buy non-sponsored products?[41] That such dealers "feel constrained" to acquiesce in Texaco's recommendation? These deficiencies in the record cannot be remedied on appeal by the assumptions of counsel. That is especially true in this case because of the manner in which it was tried by the Commission's staff.

Prior to issuance of the complaint, the Commission had devoted at least five years to an investigation of Texaco's TBA practices. During that interval not only had documents been examined and statistics been collected but witnesses were interviewed and questionnaires were circulated. With all this investigation and with some 38,000 Texaco dealers to choose from, ***not a single Texaco dealer was called to testify by Commission counsel.***

In the course of the proceedings Texaco moved to obtain the names and other particulars of those "possible prospective witnesses" with whom the Commission staff had communicated but who were not called (A.I. 28-9). After complaint counsel replied, asserting that the information was "confidential" and that Texaco could not be prejudiced by "information that is not introduced in the

---

[41] Petitioner does not even tell us what those "strong countervailing factors" are supposed to be, much less document its point by record references.

record" (*id* at 30), the Examiner denied Texaco's motion. Hiding behind this veil of secrecy, counsel would not even admit that questionnaires were sent to particular Texaco dealers or distributors who handled non-sponsored TBA, much less that they had replies to their inquiries (A.I. 327-29; A.III. 1780-81).

But the evidence Texaco developed from witnesses it called, who had received written inquiries from the Commission, leaves no doubt that the Commission staff had in fact canvassed an unknown number of Texaco dealers and distributors by mail and then did not call them as witnesses (A.III. 1780; 1793-94; 1846; 1873-74; A.V. JAX 429): Texaco obtained a copy of the response of one Texaco distributor who stated that he had purchased from Texaco for 42 years and that he had always handled non-sponsored TBA. He added:

> "We have never purchased any B. F. Goodrich or Firestone products. I have been asked if I would like to handle Firestone through the Texas Company with no pressure at all put on me to do it. The Texas Company has never high pressured me during the forty-two years I have deen dealing with them" (A.IV. JAX 428).

Under these circumstances, there can be no doubt but that a full presentation of what the Commission had investigated and uncovered would have been favorable to Texaco. This deliberate withholding of evidence material to the defense constituted a blatant violation of due process.[42]

---

[42] *E.g., Brady* v. *Maryland,* 373 U.S. 83, 87-88 (1963); *Griffin* v. *United States,* 87 U.S. App. D.C. 172, 183 F.2d 990 (D.C. Cir. 1950); *United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135 (2d Cir. 1964); *Barbee* v. *Warden, Maryland Penitentiary,* 331 F.2d 842 (4th Cir. 1964).

Instead of putting Texaco dealers on the stand to testify to the facts, Commission counsel elected to offer the hearsay testimony of a few wholesalers each of whom stated he had difficulty selling non-sponsored TBA to one or two Texaco dealers because (those dealers allegedly said) Texaco was sponsoring other brands. This hearsay, aside from being incompetent to establish the fact,[43] was inherently unreliable[44] and, as the Court of Appeals found,

---

[43] *E.g., Buckeye Powder Co.* v. *E. I. Du Pont De Nemours Powder Co.*, 248 U.S. 55 (1918); *Superior Engraving Co.* v. *NLRB*, 183 F.2d 783, 792 (7th Cir. 1950), *cert. denied*, 340 U.S. 930 (1951).

[44] The excuses made by a buyer to be rid of an importunate seller are recognized as unreliable "in view of the risk of insincerity in a potential customer's statement why products were not being ordered." *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.*, 297 F.2d 906, 914 n. 10 (2d Cir. 1962), *cert. denied*, 369 U.S. 865 (1962). Here, the government did not even introduce evidence that the dealers who allegedly made such statements sold only sponsored TBA. In fact, they didn't (A.III. 2014-15, 2016-17, 2026-27, 2170, 2198). Indeed one such dealer testified that, far from refusing to buy the non-sponsored merchandise offered, he had placed an order which the supplier had never even filled (A.II. 1579). See also, for denials of the alleged statements A.II. 1406-09, 1410, 1414, 1478-79, 1577, 1579-80, 1580-82, 1584, 1586-87, 1589-90, 1595; A.III. 1949.

Moreover, the hearsay statements attributed to these few Texaco dealers are unbelievable in the light of the uncontradicted testimony of the numerous dealer witnesses operating in the same regions as these dealers who testified to their understanding of Texaco's TBA policy and their open handling, display and advertising of non-sponsored TBA. For example, in the Chicago area, nine dealers so testified (A.II. 1472-77; 1486-88; 1494-97; 1501-04, 1505-06, 1508-09; 1511-13; 1520-26; 1575-78; 1585-87, 1590-91; 1597-1600). In the Georgia area similar testimony was elicited from six dealers (A.III. 1935-37; 1942-44; 1946-47; 1953-57, 1958; 1970-74; 1977; 1980-82). One of the dealers in the Georgia area, Conner, advertised his non-sponsored tires on radio programs three times a week (*id.* at 1981). See also A.V. JAX 438, 494-95, 496-99, 500, 501, 502, 503, 504-06, 507-08, 509, 510, 511 (photographs of displays of non-sponsored TBA in Chicago); JAX 600-06 (map of Chicago).

rebutted by overwhelming evidence to the contrary (A.VI. 118) (see record references at A.I. 131-44). At best, the wholesaler testimony portrayed "isolated instances" and did not constitute substantial evidence. It was in this sense that the Court of Appeals regarded it as not "representative" (*ibid.*).

This wholesaler testimony—hearsay to begin with, relating to isolated incidents and overwhelmingly rebutted—was patently insufficient to support a finding of foreclosure.

Furthermore, as pointed out above, four out of five Texaco dealers do not handle sponsored batteries or accessories and two out of three do not handle sponsored tires (*supra*, pp. 45-6). Since the vast majority of Texaco's dealers obviously do not feel constrained to acquiesce in Texaco's recommendation, there is no basis for assuming that the minority of dealers who purchase sponsored TBA do so for any reason other than genuine satisfaction with the quality and marketability of Goodrich and Firestone products and the service that goes with them.

Petitioner misses the point when it argues that the question is not whether all or most Texaco dealers "felt constrained" (P. Br. 25). The point is that the evidence does not establish that *any* Texaco dealer felt constrained. The mere fact that Texaco dealers bought substantial amounts of leading nationally advertised brands of TBA promoted by Texaco does not mean that their purchases were the result of a feeling of constraint. For aught that appears, Texaco dealer purchases of sponsored products corresponded with the general market penetration of such brands. In *Atlantic*, it was only *after* the fact of foreclosure was established by the oil company's pressure tac-

tics [45] that the Court looked at the substantiality of the commerce foreclosed.[46] Here, *per contra,* there was no showing that sponsored purchases were made contrary to the dealer's will or that, without Texaco's promotional activities, the dealer would have purchased a non-sponsored brand. It is one thing to say that no market analysis is required in a case involving a practice analogous to a tying arrangement where substantial sales result; it is quite another merely to look at the substantiality of sales in a case where dealers are free to accept or reject a recommendation with no strings attached.

Failing all else, petitioner attempts to rely upon the experience acquired by the Commission in the other two "related" TBA cases [47] and it chides the Court of Appeals for ignoring this experience (P. Br. 10). The shoe is on the other foot. The Commission itself distinguished between the *Texaco* record and the other two when it condemned the Atlantic and Shell programs and simultaneously remanded *Texaco* to the examiner for the reception of addi-

---

[45] "*Thus* [referring to the establishment of the requisite adverse competitive effects] the Commission was warranted in finding that the effect of the plan was as *though* [emphasis is the Court's] Atlantic had agreed with Goodyear to require its dealers to buy Goodyear products and had done so" (381 U.S. at 370).

[46] "But just as the effect of *this* plan is similar to that of a tie-in [as established by the actual proof of anticompetitive effects], so is it unnecessary to embark upon a full-scale economic analysis of competitive effect. We think it enough that the Commission found that a not insubstantial portion of commerce is affected" (*id.* at 371; emphasis added).

[47] The Commission is said to have had

> "*** the benefit of the experience it had gained through its comprehensive studies of the use and effect of such arrangements made in the related *Atlantic* and *Shell* cases" (P. Br. 12).

tional evidence which was never forthcoming (58 FTC 1179, 1183; A.I. 179, 197). The Commission does not know anything more about the effect of TBA plans today than when it took this action in 1961. As the Solicitor General recognized in his oral argument in *Atlantic* (*supra*, pp. 31-3), the fact is that not all TBA sales commission plans are alike in their *use* and *effect*. The Court of Appeals was eminently correct in holding that Texaco's plan differed markedly in both respects from those of Atlantic and Shell.

As for the Commission's argument that all three oil companies should be accorded equal treatment (*i.e.*, subjected to a sweeping cease and desist order), the short and compelling answer was provided by the Court of Appeals:

> "But simply because Texaco is in the same line of business does not mean it must suffer the pain of the misdeeds of other oil companies; this would indeed be guilt by association" (A.VI. 119).

Conclusion

Nothing in Section 5 of the Federal Trade Commission Act prevents Texaco, pursuant to a sales commission agreement with a rubber company, from promoting the sale of sponsored TBA to its dealers when those dealers are free, they know they are free and they repeatedly exercise their freedom to purchase non-sponsored products without jeopardizing their dealership status or otherwise incurring Texaco's ill will.

What the Commission is attempting to do here is to outlaw the sales commission method of distribution, a business practice antedating this country's existence and never interdicted by Congress—even though there is nothing intrinsically unfair, oppressive or anticompetitive

about the practice and it has never been abused by Texaco. In a word, the Commission is seeking to usurp the legislative function by amending Section 5 for purposes of this case. The proper forum for its efforts is Congress not the courts.

If the Commission had observed fundamental requirements of fair play, if it had been candid with the courts, if it had followed its own mandate and that of this Court, if it had not predetermined the result by exalting uniformity of treatment among industry members above individual guilt or innocence, this matter would have been terminated years ago. The very integrity of the administrative process demands dismissal of the complaint.

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

July 24, 1968.

Respectfully submitted,

MILTON HANDLER
AMZY B. STEED
Attorneys for Respondent Texaco Inc.

STANLEY D. ROBINSON
MILTON J. SCHUBIN
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
Of Counsel

EDGAR E. BARTON
Attorney for Respondent
The B. F. Goodrich Company.

MACDONALD FLINN
WHITE & CASE
Of Counsel